

(2014) 04 CAL CK 0114
In the Calcutta High Court
Case No : C.S. No. 809 of 1979

The Tata Iron and Steel Co. Ltd.

APPELLANT

Vs

Crane Lifts

RESPONDENT

Date of Decision : 23-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20(c)
Contract Act, 1872 — Section 4, 56

Citation : (2014) 4 CHN 233

Hon'ble Judges : Debabrata Mookerjee, J

Bench : Single Bench

Advocate : Ranjan Roy and Ms. Tanuta Guray, Advocate for the Appellant;
Swarnendu Ghosh, Advocate for the Respondent

Judgement

Debangsu Basak, J.—The claim of the plaintiff was on account of value of short delivery of materials in terms of a consignment agreement. The defendant denied liability and made a counter claim.

2. The parties negotiated and entered into a contract whereby the plaintiff appointed the defendant as a consignment agent with regard to the iron and steel materials of the plaintiff. By and under the said contract, materials would be dispatched by the plaintiff from Jamshedpur to New Gauhati Railway station. The defendant would post their men at New Bongaigaon Railway station to look after and tranship the materials from Broad gauge to Meter gauge and would ensure safe delivery at the ultimate destination. In the event the defendant received short delivery, the defendant would lodge claims with the Railway authorities. Any shortage in respect of which the defendant did not lodge claim with the Railway authorities was on account of the defendant.

3. According to the plaintiff, there were short deliveries. The defendant did not lodge complaints or claims with the Railway authorities. The defendant, therefore, became liable to make good the value of the short delivery.

4. The defendant contested the suit. The defendant contended that, this Court did not have territorial jurisdiction to try the suit inasmuch as no cause of action arose within the territorial jurisdiction of this Court. The defendant was carrying on business at Gauhati outside the territorial jurisdiction of this Court. The weighing machine at the New Bongaigaon Railway station was not functioning most of the time. The plaintiff was aware of the situation. In spite thereof the plaintiff extended the validity period of the contract. The defendant suggested that, the plaintiff waived their right. The defendant made a counter claim on account of unpaid bills.

5. Nine issues were framed for the trial of the suit. Documents were disclosed and marked exhibits. Witnesses were examined and cross-examined.

6. Since the witness of the defendant was last examined, the Counsel for the defendant commenced his submissions first. Mr. Swarnendu Ghosh learned Advocate for the defendant, took the point of lack of territorial jurisdiction first. He placed various paragraphs of the plaint and the 3 letters exchanged between the parties being Exhibits "A", "B" and "C" and contended that, no part of the cause of action of the suit arose within the territorial jurisdiction of this Court. The plaint described the defendant to be carrying on business outside jurisdiction. The letter dated August 7, 1975 written by the defendant being Exhibit "A" was received by the defendant at Gauhati outside jurisdiction. Exhibit "B" being the letter dated October 15, 1975 was written by the plaintiff to the defendant outside jurisdiction. Exhibit "C" was the letter dated October 20, 1975 written by the defendant from outside jurisdiction. The contract was performed outside jurisdiction. Breach, if any, was occasioned outside jurisdiction. The security deposit was made by a bank draft. Its encashment within jurisdiction would not vest the Court with jurisdiction.

7. It was contended that, the offer made by the plaintiff was confirmed by the defendant from outside jurisdiction. Reliance was placed on All India Reporter Oil and Natural Gas Commission and Others Vs. Modern Construction and Company, for the proposition that, in case of communication of acceptance by a telegram, the place of the contract was the place where the telegram started its journey.

8. It was next contended that, the contract was performed wholly outside jurisdiction. Reliance was placed on All India Reporter A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, in support of the proposition that, a suit in respect of the breach of which was complained of could be filed at the place where the contract was required to be performed or its performance completed.

9. According to the defendant, the payment of Rs. 10,000/- by the defendant as security deposit to the plaintiff within jurisdiction did not create any part of the cause of action. In support of such contention reliance was placed on All India Reporter Union of India and Others Vs. Adani Exports Ltd. and Another, .

10. On behalf of the defendant, All India Reporter Sreenivasa Pulvarising Industries Vs. Jai Glass and Chemicals Pvt. Ltd., for the proposition that, cause of

action for a suit on breach of contract would arise not only where the goods were to be delivered but also where the price became payable on such delivery and All India Reporter American Pipe Company Vs. State of Uttar Pradesh for the proposition that a breach of contract or offer was no part of the cause of action, were relied upon.

11. On merits, the defendant contended that, the goods always reached the defendant in loose condition. The weighing machine of the Railways at New Bongaigaon was nearly always lying defective. Railways did not issue any short certificate in spite of request. This fact was known to the plaintiff. In that regard the defendant placed reliance on the various documents exhibited and questions and answers of the two witnesses.

12. A case of acquiescence and waiver was also made out on behalf of the defendant. It was claimed that, everything was done under the guidance and supervision of the plaintiff and that, the plaintiff accepted the situation obtaining at the railway station and the factum of short delivery and thereafter extended the contract. Therefore, the defendant could not be made liable for the short delivery. The plaintiff was aware of the shortages. The plaintiff was also aware that the Railways were not issuing such certificates.

13. The defendant questioned the credibility of the witness of the plaintiff. It was submitted that, the witness of the plaintiff did not have any personal knowledge.

14. On behalf of the defendants three authorities were cited for the proposition that, a practical point of view was required to be taken by the Court since the facts would demonstrate that, it was not possible to obtain the shortage certificate. Reliance was placed on All India Reporter Satyabrata Ghose Vs. Mugneeram Bangur and Company and Another, , All India Reporter The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath, and All India Reporter Raja Dhruv Dev Chand Vs. Harmohinder Singh and Another, in that regard.

15. Mr. Ranjan Roy learned Advocate for the plaintiff, submitted that, this Court had territorial jurisdiction to determine the suit. The agreement was arrived at 43, Chowringhee Road, Kolkata within the territorial jurisdiction of this Court. The letter dated October 15, 1975 of the plaintiff was issued from within jurisdiction and accepted by the defendant at Gauhati. The defendant paid the security deposit to the plaintiff at Kolkata within jurisdiction. All papers and documents in respect of the dealings and transactions by and between the parties were carried out and were lying at Kolkata within jurisdiction. The stock verification was carried out from the office at Kolkata within jurisdiction. The defendant was under the obligation to produce all books of accounts maintained in respect of the transaction at the principal place of business of the plaintiff at Kolkata within jurisdiction. The issue of territorial jurisdiction, according to the plaintiff, was laid at rest by the Order dated June 27, 1980 after such order found the Court have jurisdiction over the suit.

16. On merits, it was submitted that, there were short deliveries were admitted

fact between the parties. The quantum of short delivery would appear from Exhibit "E". In course of submissions on behalf of the plaintiff, reliance was sought to be placed on few letters which were marked for identification. The defendant protested as to the documents which were marked for identification being considered at the trial. It was submitted on behalf of the plaintiff that, the short delivery was in excess of the allowable limit. Short delivery being in excess of the allowable limit the plaintiff was entitled to the value of such materials.

17. On behalf of the plaintiff, a written note of argument was relied upon. The plaintiff did not cite any authority from the notes on argument.

18. I have considered the respective contentions of the parties, the materials on record and the pleadings. The jural relationship between the parties was admitted. The defendant acted as the consignment agent of the plaintiff pursuant to and in terms of the letters dated August 7, 1975, October 15, 1975 and October 20, 1975. The consignment agreement was for one year. The agreement was extended thrice. Under the agreement, the defendant was required to handle the materials of the plaintiff at the New Bongaigaon Railway station. Any quantity of materials short delivered and for which no claim was lodged with the Railway authorities was on account of the defendant. The plaintiff claimed that on stock verification in 1977 and 1979 shortages were found and that, the defendant was liable for the same. The claim was quantified on the value of the shortage.

19. The witness of the defendant, claimed himself to be associated with the business of the defendant since inception. It was claimed that, the defendant was once a partnership firm and was later converted into a sole proprietorship concern. In examination in chief the witness for the defendant stated that, the defendant never received the entire quantity of consignment sent by the plaintiff. In evidence, the witness of the defendant claimed that, the factum of short delivery was always brought to the notice of the plaintiff. The weighing machine at the railway yard was not working nearly all the time. The defendant sought to explain that, it was not liable for the short delivery and that, it had no role to play in the short delivery.

20. In its evidence, the witness of the plaintiff stated that, it was the obligation of the defendant to make good the loss the plaintiff on account of short delivery. The plaintiff sought to establish that, the defendant did not maintain proper books of accounts. There were short deliveries and such fact was brought to the notice of the defendant.

21. The question of territorial jurisdiction was raised and required adjudication. The plaintiff relied upon the Order dated June 27, 1980 and submitted that, the issue of jurisdiction was conclusively decided by the holding that, this Hon'ble Court had jurisdiction to try the suit. The issues for trial in the suit were settled on September 5, 2001. Issue of jurisdiction was settled as issue no. 2. While settling the issues it was observed that, the issue of jurisdiction could be taken

up as a preliminary issue but from the submissions of the learned Counsel of both the parties it appeared that, the said issue could only be decided after taking evidence. The issue of jurisdiction was, therefore, open and not decided conclusively by the order dated June 27, 1980 as sought to be contended on behalf of the plaintiff. Since the issue of jurisdiction was not conclusively decided by the order dated June 27, 1980, the parties allowed the Court to frame the issue of jurisdiction subsequently and agreed to have such issue decided after evidence.

22. In *Oil and Natural Gas Commission (supra)*, the Division Bench of the Gujarat High Court was considering the interpretation and applicability of the provisions of Section 20(c) of the Code of Civil Procedure, 1908 and Section 4 of the Indian Contract Act, 1872. One of the questions considered by the Division Bench was, whether part of cause of action for breach of contract arose at the place of transmission, i.e. sending communication or place of receipt of it when made by a letter or telegram. Their Lordships were of the view that, making of a contract was a part of cause of action and a suit for breach of contract, therefore, could also be filed at the place where the contract was concluded or made. Determination of the place where it came to be made was part of the law of contract. When a contract was made by correspondence, the place where the letter or telegram of acceptance was posted, so far as the proposer was concerned, was the venue for filing suit on the basis of place of making the contract. Their Lordships were of the view that, the real place of making of contract was the place where the communication came to be received and in case of communication by post or telegram, the place where it started its journey and not the place where it ended.

23. In *ABC Laminart (supra)* it was held that, in the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consisted of the making of the contract, and its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. It went on to hold that, part of cause of action arose where money was expressly or impliedly payable under a contract.

24. In *Union of India (supra)*, the expression "cause of action" was explained by the Apex Court. In *American Pipe Company (supra)* the Division Bench of this Court was concerned with a contract entered into by correspondence through post. It was held that, in such circumstances, receipt of acceptance within jurisdiction, did not form part of cause of action, since according to the agreed mode of communication the contract was to be formed through post. In *Sreenivasa Pulvarising Industries (supra)* the division bench of this Hon'ble Court held that, in a suit for damages for breach of contract the cause of action consisted of the making of the contract and its breach. Such a suit could, therefore, be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. Their

Lordships went on to hold that, in a contract which required performance and payment of price, cause of action for a suit for breach of such contract would arise not only where the goods were to be delivered but also where the price would be payable on such delivery.

25. It would be seen from Exhibit "B" that, the plaintiff by its letter dated October 15, 1975 offered to appoint the defendant as consignment agent on the terms and conditions mentioned therein including the condition that, the defendant must confirm the arrangement by returning to the plaintiff the duplicate of the letter dated October 15, 1975 duly signed by the defendant along with the stamped indemnity Bond as per the proforma enclosed. The offer was admittedly issued from within jurisdiction. The offer required two acts to be performed by the defendant prior to the offer maturing to a contract. The offer required the defendant to confirm the arrangement by returning to the plaintiff the duplicate of the letter date October 15, 1975 and a duly executed stamped indemnity bond to the plaintiff. These obligations of the defendant were discharged by the defendant though its letter dated October 20, 1975 being Exhibit "C". This letter was addressed to the plaintiff at 43, Chowringhee Road, Kolkata within the territorial jurisdiction of this Court. The terms of the offer were such that it would become complete on receipt of the signed duplicate letter and the duly executed indemnity bond by the plaintiff. Both these documents were received by the plaintiff at Kolkata within the jurisdiction of this Court.

26. The defendant sent the security deposit and the indemnity Bond to the plaintiff at Kolkata within jurisdiction. The indemnity Bond was Exhibit "D". By such indemnity Bond the defendant agreed to keep the plaintiff harmless and indemnified for all losses, damages, shortages, costs and expenses while the materials were in the custody of the defendant. In the indemnity Bond, the plaintiff was described as of 43, Chowringhee Road, Kolkata lying and situate within the territorial jurisdiction of this Court. There was no dispute between the parties with regard to such fact. The defendant as consignment agent, therefore, undertook by the indemnity bond to pay the plaintiff at such office at Kolkata within territorial jurisdiction of this Court.

27. In the facts and circumstances of this case, the contract was made at Kolkata within jurisdiction. The defendant was obliged to pay the plaintiff at Kolkata within jurisdiction. Applying the ratio of the authorities cited, it could not be said that, this Court did not have jurisdiction to entertain and determine the suit.

28. The defendant sought to rely upon the doctrine of frustration of the contract and/or impossibility to contract due to supervening impossibility. It was contended on behalf of the defendant that, it was impossible for the defendant to discharge their obligations on account of short delivery for factors beyond their control. The Railway authorities did not have a functioning weighing machine most of the time. The defendant could not be held liable on such score. The defendants relied upon three authorities on the doctrine of frustration.

29. In *Satyabrata Ghose* (supra) the Supreme Court considered the doctrine of frustration. Impossibility of performance of the contract and frustration were often used as interchangeable expressions. The doctrine of frustration was an aspect or part of the law of discharge of contract by reasons of supervening impossibility or illegality of the Act agreed to be done and hence came within the purview of Section 56 of the Indian Contract Act, 1872.

30. In *Naihati Jute Mills Ltd.* (supra) the Supreme Court considered the doctrine of frustration laid down u/s 56 of the Indian Contract Act, 1972. Their Lordships held that, the doctrine of discharge by frustration was not available when the contract made full and complete provisions for a given contingency.

31. In *Raja Dhruv Dev Chand* (supra) the Supreme Court was of the view that, the doctrine of frustration contained in Section 56 of the Indian Contract Act, 1872 did not apply to completed transfers. The doctrine of frustration of the impossibility to act in terms of contract was pressed into service by the defendant. It was contended by the defendant that, the weighing machine at the New Bongaigaon Railway station being defective, it was not possible for them to measure the actual shortage and lodge any claim for shortages with the Railway authorities. It was urged on behalf of the defendant that, the Court was required to take a practical view of the situation and exonerate the defendant of the shortages.

32. The shortages were an admitted fact. The parties while entering into the contract contemplated that, there would be shortages. The contract provided for the respective obligations of the parties in the event of a shortage occurring in respect of any consignment. The parties, therefore, provided for the eventuality of a shortage in respect of the transaction. Applying the ratio of *Naihati Jute Mills Ltd.* (supra) the doctrine of frustration or impossibility envisaged under the Indian Contract Act, 1872 was, therefore, not available to the defendant. Furthermore, the parties were governed by the exact terms of the contract. It was not for the Court to rewrite the contract. The contract provided that the defendant would be accountable for the shortages. The parties to the contract were entities of commerce. They entered into a contract which contemplated shortages and provided for the respective obligations in such eventuality. It was not for the Court to impose its wisdom in hindsight on a purely commercial transaction between two commercial entities. It was not for the Court to exonerate the defendant on the plea that a practical view was required to be taken. The parties must be held to their bargain.

33. The claim and counterclaim between the parties required determination. The plaintiff claimed compensation for short delivery. According to the plaintiff the defendant did not maintain proper accounts. The defendant was guilty of short delivery beyond the allowable limit. Short delivery was an accepted position. The defendant accepted that, there was short delivery. The defendant however sought to explain the short delivery and contended that, the railway yard did not have a functioning weighing machine most of the time. In any event, the plaintiff

was well aware of the circumstances obtaining at the railway yard. In spite of being aware of such difficulties, the plaintiff extended the contract period thrice.

34. On query from Court as to the document in support of the claims particularised in paragraph 7 of the plaint, the learned Counsel for the plaintiff sought to rely upon documents which were not proved and marked as exhibits. The learned Counsel for the defendant protested to the plaintiff relying upon documents which were not proved and marked exhibits in trial. On such protest, the learned Counsel for the plaintiff relied on Exhibit "E". Exhibit "E" was a letter dated April 26, 1979 written by the defendant to the plaintiff. This letter was addressed to the plaintiff at Kolkata. This letter referred to notices dated April 26, 1978 and March 6, 1979 written by the plaintiff to the defendant. These two demand letters were, however, not marked as exhibits in the suit. By Exhibit "E" the defendant quantified the total shortages for the entire period of the contract to be at 494 metric tonnes.

35. In paragraph 7 of the plaint, the plaintiff quantified its claim. According to the plaintiff, there was short delivery of 506.114 metric tonnes and the total recoverable value for short delivery was Rs. 10,89,086.06 p. Calculating at the same rate at which the plaintiff calculated for 506.114 metric tonne after allowing for shortages allowable, the defendant was liable to pay the plaintiff a sum of Rs. 10,60,936.68 p. The value of one metric tonne of material was derived after dividing Rs. 11,76,064.04 p. by 506.114. The value for one metric tonne came to Rs. 2,323.70 p. That was then multiplied with 494 metric tonne to arrive at the figure of Rs. 11,47,910.66 p. The value of shortages allowable of Rs. 86,973.98 p. was then deducted. The value of the goods short supplied was, therefore, Rs. 10,60,936.68 p. The defendant was liable to pay such sum to the plaintiff.

36. The nature of transactions between the parties was commercial. The plaintiff was entitled to interest. There was no averment in the plaint for interest excepting a prayer to such effect. No rate of interest was claimed in the plaint. In the fitness of things, the plaintiff was required to be compensated for non-receipt of the value of short delivery of materials from the date of affirmation of the plaint being October 24, 1979 till realisation. Keeping in view that the nature of the transaction between the parties was commercial, I award interest at the rate of 10% per annum on and from October 24, 1979 till realisation.

37. There would, therefore, be a decree in favour of the plaintiff against the defendant for a sum of Rs. 10,60,936.68 p. together with interest at the rate of 10% per annum on and from October 24, 1979 till realisation.

38. The counterclaims of the defendant were two folds. According to the defendant, the plaintiff virtually assured supply of 2,000 metric tonnes of materials per month. Based on such assurance of the plaintiff, the defendant mobilised resources. Such quantity of materials was never despatched by the plaintiff. Consequently the defendant suffered loss and damages quantified at Rs.

21,11,475/-. In course of submissions, the learned Counsel for the defendant, very fairly submitted that, there was no document to establish such claim. The defendant relied upon the answers given to question nos. 37 to 45 of its witness and the answers given in cross-examination of the plaintiffs witness in question nos. 156 to 159. The defendant's counterclaim on this score was based solely on an alleged verbal assurance. The witness of the plaintiff denied any such assurance being given. The defendant failed to establish its counterclaim on this score.

39. The next counterclaim was on account of bills remaining outstanding for the sum of Rs. 26,307.37 p. This claim was not pressed.

40. The counter-claims of the defendant are, therefore, dismissed.

41. C.S. No. 809 of 1979 is decreed accordingly without any order as to costs. The Department will draw up and complete the decree expeditiously.